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Supreme Court, U.S.
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No. 93-2044

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SHERMAN L. SHAW,
Petitioner,

vs.

FRANK W. MASTERS, et al,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OPPOSING A MOTION TO DISMISS

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24 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should a District Court and Appeals Court ignore relevant case law in ruling on the state of the law on grounds of an immunity defense and the eleventh Amendment? Hafer v Melo, 498 U.S. 1118(1991), overuled Will v Michigan Dept. of State Police, 491 U.S. 58 (1989).

2. Does not a plaintiff have a right__ to discovery in medical Malpractice case where he was injured during surgery when he was unconscious and under anesthesia? Pagano v Orville Hospital, 145 FRD 683__ Health Care Quality Improvement Act # 42 U.S.C.A. # 11101. (HCQIA).

3. Does Concealment of the injury toll the Statute? Bailey v Glover (1875) 115 US 21 Wall 342, 22 L. Ed 636; Pavlak v. Church C,A, IDAHO 1984, 727 F 2d 1425;.. K.S.A. 60-513; Holmberg v. Armbrecht,327 U.S. 392, 396-397, 66 S Ct 582, 90 L Ed 743 (1946); Kansas sta. KSA 60-513(c)

PARTIES TO THE PROCEEDING

The parties to this action in the United States Court of Appeals for the Tenth Circuit were Frank W. Masters, David W. Robinson, Gene Arthur Budig, John C. Mcfadden, members of the Univ. of Kansas medical Center; Fred Allenbrand,

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28 U.S.C.A. 1332

BRIEF OPPOSING MOTION TO DISMISS

RIGHT TO JURY TRIAL

Trial of nonjury issues may not be used to collaterally estop party on fact issues as to which it is entitled to a jury determination., Printers II, Inc., v Professionals Publishing, Inc., 784 F 2d 141 (2nd Cir. 1986).

The Supreme Court has set the rules on right to a jury trial on fact issues and non jury issues where jury issues are involved in the same suit., Lytle v Household Manufacturing, Inc,. dba Schwitzer Turbochargers, 494 U.S. 545, 108 L Ed 2d 504,110 S Ct 1331

Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" Poller v. Columbia Broadcasting Sys., Inc., 1962, 82 S. Ct. 486, 491, 368 U.S. 464, 473,L Ed 2d 458.

BRIEF OPPOSING MOTION TO DISMISS (Continued)

Undue Limitation of Discovery

Although a District Court has considerable lattitude in determining the scope of discovery, it abuses its discretion when discovery is so limited as to effect a party's substantial rights. , Goldman v Checker Taxi Company, 325 F 2d 8 , 8 6 (7th Cir 1963); See Rôeling v Anderson 103 U.S. App. D,C. 237, 257 F 2d 615, 619 (1958)

Grants of summary judgment on incomplete records are generally disfavored, and this is particularly true where it is concluded that the District Court's discretion over the fact . finding process has been tainted by an erroneous view of the law.

Party from whom discovery is sought has burden of showing "good cause" for protective order. 768 F 2d 669, 684 (5th Cir) cert. denied 475 U.S. 1011, 106 S Ct 1186 L Ed 2d 302 (1986) Am. Benefit Life Inc Co. v. Ille 87 FRD 540, 543 (W.D. Okla 1978)

BRIEF OPPOSING MOTION TO DISMISS(Cont.)

To grant injunctive relief under the doctrine of Harlow v Fitzgerald., 457 U.S. 800.

To determine whether respondents here can point to some statute to privilege or immunity they claim and upon what statute is it based.

To allow petitioner to discover the names of the Doctors in attendance on day of his surgery who performed the surgery on him since under the (HCQIA), HEALTH CARE QUALITY IMPROVEME ACT known under statute 42 U.S.C.A. 11101-11111 et seq. does not establish such a broad privilege . There is no federal statutory basis for a medical peer review privilege Dowling v American Hawaii Cruises, Inc 971 F 2d 423 (9th cir 1992)

To establish a continued commitment to the bill of rights under the doctrine of Katz v v United States 389 U.S. 347 and U.S. v United States District Court.

STATUTE OF LIMITATIONS IN A CONSPIRACY

The statute of limitations in a conspiracy does not accrue until the conspiracy ran its course. This is a chain conspiracy which is characterized by different activities carried on with same subject of conspiracy in chain-like manner that each conspirator in chainlike manner performs a seperate function which is to serve in the accomplishment of the overall conspiracy.

Although a civil rights plaintiff asserted claims for false arrest and false imprisonment as well as malicious prosecution, all claims essentially related to alleged conspiracy to frame him for murder of police officer and statute of limitations did not accrue until conspiracy ran its course., Maruffi, C.A. 10th (n.m.) 1990, 895 F 2d 649.

Officials of the University of Kansas Med-center operating under an unconstitutional state statute in conspiracy with federal offic ers and federal officials set out to frame me by making possible an act for entrapment

Defendants knew that i would suffer a long duration of injury when they met and decided to commit the injury through concealment.

Statements of coconspirators are admissible against defendant, where from record, it is clear that defendant's own statements and acts demonstrates that he participated in conspiracy and that he engaged in affirmative steps to further conspiracy.

Defendants were entitled to summary judgment on qualified immunity grounds if they can establish as a matter of law that the search comported with the fourth amendment even though it actually did not., Harlow v Fitzgerald 457 U.S. 800: Anderson v Creighton et al no 85-1520 (argued Feb 23, 1987- decided june 25, 1987 (8th cir)

Affirmative proof is such proof or such evidence of the truth of matters asserted as tends to establish them regardless of the character of evidence offered. In respect to the question of summary judgment a fact is material if it constitutes a legal defense in the action.(not a sham pretense) Kenneth-Murray Corp v Bone Ca 1980, 622 F 2d 887.

The Supreme Court does not create an evidentiary privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence in as much as "(T)estimontal exclusiorary rules and privileges contravene the fundamental principal that the public has a right to every man's evidence'", And any such privilege must be strictly construed

"Moreover although rule 501 manifests a congressional desire "not to freeze the law of privilege but rather to provide the courts with flexibility to develope rules of privilege on a case by case basis, we are disinclined to exercise this authority expansively. " (citations). 493 U.S. at 189, 110 S Ct at 582. The court went on to note that congress considered but did not include a peer review privilege when it extended title VII to educational institutions. Id at 189-193, 110 S Ct at 582-584.

The ninth circuit subsequently declined to imbrace the analogous privilege of self-critical analysis." Dowling v American Hawaii Cruises, inc 971 F 2d 423 (9th cir 1992)

There is no federal statutory basis for a medical peer review privilege. The federal health care quality improvement act of 1986, 42 U.S.C.A. #11111 et seq. (hereafter "HCQIA", or the act") does not establish such broad based privilege.

It does accord antitrust liability immunity to medical "professional review" Participants whose actions conform to the standards of the act(id #11111) and protection against extraneous disclosure of confidential information thus generated (#11137(b)(1); However, these protections are based on the assumption that the underlying professional review actions were conducted "in the belief that the action was in the furtherance of quality health care" #11112(a). The integrity requirement is by the many exceptions to immunity set forth in #11111, including actions relating to civil rights

act of 1964, 42 U.S.C.A. #2000 et seq., and the civil rights acts, 42 U.S.C.A. #1981 et seq and the clayton act (15 U.S.C. #15c).

The act (HCQIA) infers support of disclosure when the very litigimacy of a medical peer review committee proceeding is at issue.

Without statutory authority executive officer may not erect privilege not to produce documents which will bar judicial scrutiny., Rosee v Board of (Trade) ___of Chicago, D.C. Ill 1964, 33 FRD 512;,

A document necessary, not absolutely privileged in possession of the defendant and requested by the plaintiff must be produced and made available as part of the administrative file insofar as it relates to the plaintiff himself but not to a stranger to the litigation., Weiss v U.S., 1967, 180 Ct Cl 863.

Chancellor's immunity qualified or not can not be claimed in a violation of my rights to procedural due process and equal protection of law.

INJUNCTIVE RELIEF

Petitioners' complaint may be contrued as seeking injunctive relief in addition to monetary damages. Defendants have had full notice and a full chance to respond to the things put in issue which constitutes a violation of the 1st, 4th, and 14th amendments under federal law, a violation of the Health Care Quality Improvement Act(HCQIA) #42 U.S.C.A.11101-11112., two assults upon my body(one upon my left thigh and one upon my brain, in violation of wiretap statutes and a violation of provisions of electronic surveillance provisions which violates the supramcy clause under the federal constitution.

Qualified immunity is unavailable for injunctive relief., Harlow v Fitzgerald,457 U.S. at 818, 102 S Ct at 2738.

This is an ongoing conspiracy made possible by defendant's setting a force in motion by commiting these injuries.

University Chancellor was not entitled to qualified immunity on #1983 Claim for termination of tentured professor in violation of his right to procedural due process since such action violates clearly established rights., Collins v Marina-Martinez C.A. 1 (Puerto Rico) 1990, 894 F 2d 474 CF. (This was an Official Act)

Physicians were not entitled to summary judgment in medical malpractice suit against them where there motions were supported by only their personal affidavits which stated simply that in their personal affidavits which stated simply that in their expert opinion neither of them was guilty of malpractice., Rienke v Oconner C.A. 11 (Ga), 1986 790 F 2d 850 rehearing denied 797 F 2d 982.

Attempts to frame and entrap a citizen to coverup wrongdoing by those who wear a badge of authority should not be tolorated by the courts,. Keith Jacobsor (Petitioner) v. U.S. 112 S Ct 1535(1992)

PURPOSE OF REQUIREMENT

Sole purpose of requirement of this rule that every judgment be set forth on a seperate document is to clarify when the time for appeal begins to run, Bankers Trust Co. v Mallis , N.Y. 1978, 98 S Ct 1117, 435 U.S. 381, 55 L Ed 357 rehearing denied, 98 S Ct 2259,416 U.S. 915, 56 L Ed 2d 416. see also, Ellison v Conoco, Inc C.A. 5(La) 1992, 95o F 2d 1196.

Purpose of this rule requiring that every judgment be set forth, is to protect an appellant from dismissal of his for untimeliness and where an application of this rule does not serve such purpose it is unnessary to afford them them appeal

This conduct was declared and ruled to be illegal in Katz v United States when it was ruled by the Supreme Court and i quote; We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the " Trespass " doctrine there enunciated can no be regarded as controlling. Katz v United States 389 U.S. 347.

Under Hafer v Melo, Official action is not protected by immunity, when that very official action has been established to be illegal., Katz v U.S. supra; Hafer 112 S Ct 358, 116 L Ed 2d 301 1991.

The Supreme Court has shown a long commitment to the bill of rights. In U.S. v. United States District Court it stated: We look to the bill of rights to safeguard this privacy. The broader spirit of fourth amendment now shields private speech from unreasonable surveillance.

In the appeals court some unknown person implanted a "foreign object" in his left thigh.

Statement of Facts

The University of Kansas has a team of doctors known as the Kansas Surgery association which lists seven doctors which are known as a partnership. on 1-13-1992 which counsel knows from the record, i sent the special process server to the University of Kansas Medical Center for the express purpose to learn who of the surgery department remained and to obtain the individual names of the members of the plastic surgery association. I told him to not to leave until he had obtained the necessary information. He spent the whole day until late in the afternoon from that morning, before he was finally able to contact any one. Finally he was directed to the plastic surgery department in which the administrator of the surgery department told

the special court appointed process server that she was authorized to receive service for the plastic surgery department because she was the administrator. Her name was Mary Gosney. I had told the process server to obtain a list of the members of the Drs as of the date of 1-13-1992. this is the the list that she wrote in her own hand-writing.

Plastic Surgery Department

for Dr Boraz-Mag 1/13/1992
Dr. Baker
Dr Robinson
Dr Mani
Dr Masters
Dr Hiebert

The record given at this time listed David W. Robinson as still at the medical center and still a member of the partnership.

Frank W. Masters was still listed as at the medical center and member of the partnership.

The only name missing was Roger N Bise, who was assigned as my docter and the letter in the record from Roger N. Bise dated 3-5-1990 listed Dr masters still at the medical center and a member of the partnership and also Dr Robinson was still there on 3-5-1990.

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BURDEN OF PROOF

Burden of showing same issue was actually and necessarily determined in the prior action lies on the party asserting preclusion M. Conners v Tanoma Mining Co. C.A.D.C.1992 953 F 2d 682.

It was ruled, because the precise basis for decision was unclear, there was no preclusion.

Motion to dismiss could not be treated as motion for summary judgment where there had not been oral argument on issue and defendants had set forth no facts that would be admissible in evidence., Wolford v Budd Co., W.D. Va. 1993, 149 FRD 127.

There was no seperate document indicating a final judgment since there was nothing in issue but like of venue and jurisdiction.

RULE 58 Entry of judgment

District Courts should take care to enter a seperate judgment when they make a final disposition in a case. C.A. 8(mo)1988, 862 F 2d 161.

Local rule that requires entry of summary judgment simply if no papers opposing motion are filed or served, and without regard to whether genuine issues of material fact exist, would be inconsistent with summary judgment rule, and thus would violate federal rule that allows local rules only if they are " not inconsistant" with federal rules. Henry v Gill Industries, inc, C.A. 9 (Ariz) 1993, 983 F 2d 943 (28 U.S.C.A. 56 C.F.)

Burden of showing same issue was actually and necessarily determined in the prior action lies on the party asserting preclusion., M. Conners v Janoma Mining Co. C.A. D.C. (1992) 993 F 2d 682. It was ruled, because the precise basis of decision was unclear there was no preclusion.

Qualified immunity is affirmative defense, and burden of proving defense lies with official asserting it., Houghton v. Souyh, C.A. 9 (Mont) 1992, 965 F 2d 1532

Immunity from suit under #1983 is predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it," Imbler v Pachtman, 424 U.S. 409, 421, 96 S.Ct 984, 990, 47 L Ed 2d 547(1976).

Officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue, Burns v Reed, 500 U.S. 111 S Ct 1934, 114 L Ed 2d 547 (1991).

The Supreme Court has refused to extend absolute immunity beyond a very limited class of officials.

Where the evidence tends to connect a wrongdoer with the wrongful acts charged in the absence of any evidence explaining his conduct or any justification ever/ inference warranted by the evidence shall be taken against him., 86 C.J.S. Torts 59, page 983 note 82.

General rule in federal practice disfavors privileges not constitutionally based., WM. T. Thompson Co. v General Nutrition Corp. Cite as 671 F 2d 100 (1982).

IMMUNITY (continued)

Immunity available at common law will not be recognized if history or purpose or purpose of 1983 counsel against applying that in 1983 actions. Wyatt v. Cole U.S. Miss 1992, 112 S. Ct 1827

In determining whether immunity defense is available in 1983 suit, critical intial question is whether official claiming immunity can point to common law counterpart to privilege he asserts. Enlow v Tishomingo County, Miss., Ca. 5 (Miss) 1992, 962 F 2d 101

Common law immunities are not to be imported wholesale into this section., Briscoe v Lahue, C.D. Ill 1981, 663 F 2d 713, affirmed 103 S Ct 1108, 460 U.S. 325, 75 L. Ed 2d 96, certiorari denied 103 S Ct 1426, 460 U.S. 1037, 75 L Ed 2d 787

Because it detracts from 1983's broad remedial purpose, absolute immunity applies only to a limited class of officials and functions suc as prosecutors, executive officers iniating adminstartive proceedings,

TOLLING OF STATUTE, WIRETAPPING
ELECTRONIC SURVEILLANCE

Applying the due diligence standard to this case, no base for summary judgment in favor of appellees on statute of limitation grounds can be found. a wiretap is by nature secret, and extraordinary effects were undertaken to conceal the surveillance program involved. Such affirmative acts according to fitzgerald v Seamans, supra n 40, 180 U.S. App D.C. at 83; 553 F 2d 228 would provide the agravation needed to bring this case within the traditional view that the statute of limitations is tolled when there has been fraudulent concealment of the injury that would serve as the basis for legal action. See Holmberg v Armbrecht, 327 U.S. 392, 396-397, 66 S Ct 582, 90 L Ed 743 (1946).